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No. 99-1370

In the

Supreme Court of the United States

OCTOBER TERM, 1999

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; EDWARD J. MEYER, R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; ROBERT M. BENNETT, ROBERT M. JOHNSON; ANTHONY S. BOTTAR; MERRYL H. TISCH, HAROLD O. LEVY;

(Caption Continued on Inside Front Cover)

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

YONKERS BRANCH NAACP'S OPPOSITION TO STATE OF NEW YORK'S PETITION FOR WRIT OF CERTIORARI

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ENA L. FARLEY; GERALDINE CHAPEY; RICARDO OQUENDO; ELEANOR BARTLETT; and ARNOLD GARDNER, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York, URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; CHARLES A. GARGANO, as Chairman of the Urban Development Corporation; GEORGE E. PATAKI, as Governor of the State of New York, and H. CARL McCALL, as Comptroller of the State of New York,

Petitioners,

-vs-

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCE OF COLORED PEOPLE; REGINA RYER, a minor by her mother and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and THE CITY OF YONKERS,

Respondents.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly interpreted the Equal Protection Clause and 42 U.S.C. § 1983 to hold petitioners liable for school segregation in the City of Yonkers where the district court held, and the Court of Appeals affirmed, that their failure to take remedial action, together with actions which contributed to school segregation, were in response to pressures by State and local officials and their constituents who opposed desegregation on grounds that were known to be race-based?

2. Whether petitioners may properly seek Supreme Court review when this Court denied certiorari three years ago on the same issue and no intervening events warrant a contrary result?

3. Whether, as to the propriety of an Educational Improvement Plan, the petition is premature since there has never been a finding that the school district is unitary and the Court of Appeals has directed the district court to revisit the issue of vestiges?

4. Whether the petition is untimely to the extent it seeks review of the constitutionality of the Equal Educational Opportunity Act, particularly since this Court declined to review petitioners' same argument three years ago and no intervening events warrant a contrary result?

RULE 29.6 STATEMENT

In accordance with Sup.Ct.R. 29.6, respondent NAACP states that it does not have a corporate parent, subsidiary or affiliate.

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COUNTER STATEMENT OF THE CASE

In 1980, the United States sued the City of Yonkers, the Yonkers Board of Education, and the Yonkers Community Development agency, alleging housing and school segregation in violation of the Equal Protection Clause and federal civil rights statutes. The NAACP intervened as a plaintiff the following year, and the case was subsequently certified as a class action.

After trial, the district court found that the defendants had committed intentional racial discrimination in housing and in education. *See*, *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985) (Sand, J.), *aff'd*, 837 F.2d 1181 (2d Cir. 1987). Specifically, the Board had clung to a neighborhood school policy with full knowledge that the City's location of subsidized public housing only in minority neighborhoods would lead to segregated schools; had manipulated school openings and closings and attendance zones to create and preserve racially identifiable schools; had rejected several reasonable proposals that would have desegregated the student population; had consigned students in predominantly minority schools to inferior facilities and staff; had followed a policy of disproportionately assigning minority teachers and staff to schools with predominantly minority student populations and had assigned minority students disproportionately to special education classes. *See*, 837 F.2d at 1212-14.

The district court further found that the City was liable for school segregation because it had pursued a discriminatory housing policy with the intent to keep racially identifiable schools and because the mayor's appointments to the Board of Education evinced a desire to continue segregated schools in Yonkers. *Id.* at 1214-15.

A year later, the district court issued its remedial order for the Yonkers schools. *See, United States v. Yonkers Board of Education*, 635 F.Supp. 1538 (S.D.N.Y. 1986) (Sand, J.), *aff'd* 837 F.2d 1181 (2d Cir. 1987). Its *stated* goal was to achieve the desegregation of the student population in every school in the system by the 1987-88 school year. The principal tools for achieving that goal were the creation of City-funded magnet programs to attract non-minorities to predominantly minority schools and the adoption of a "controlled choice" system for student assignments. *See*, 837 F.2d at 1215. This remedial order has come to be known as the first Educational Improvement Plan ("EIP I").

In 1994, the district court held a lengthy trial on whether the State should be held liable for Yonkers's unlawful school segregation and its vestiges. The district court held, *inter alia*, that (1) State education officials knew that *de jure* segregation existed and was increasing in Yonkers schools but took no steps to prevent or remedy that segregation and (2) State education officials failed to implement established New York State policy which required eradication of even *de facto* segregation, and (3) State officials' conduct was motivated by racially-based community and political opposition to desegregation. However, the district court declined to hold the State had violated the Equal Protection Clause for its failure to remedy racial discrimination in Yonkers. *See*, *United States v. City of Yonkers*, 880 F.Supp. 212 (S.D.N.Y. 1995).

In 1996, the Second Circuit affirmed the district court's findings of fact that the State of New York had been aware of *de jure* segregation by the City of Yonkers in its public schools, and that the State had failed to take corrective measures. *United States v. Yonkers Board of Education*, 96 F.3d 600, 611 (2d Cir. 1996). However, the Court held that the State could be liable under the Fourteenth Amendment and the Equal Educational Opportunity Act. *Id.* at 619, 621.

On June 23, 1997, this Court denied the State's petition for certiorari to review the Second Circuit's opinion. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

In 1997, the district court held a second trial to determine whether vestiges of discrimination remained in Yonkers schools and, if so, to determine a proper remedy. On October 8, 1997, the district court held that, as it had in 1993, vestiges of segregation persisted. (39a). *See, United States v. Yonkers Board of Education*, 984 F.Supp. 687 (S.D.N.Y. 1997). Accordingly, the district court ordered the State and City defendants to fund EIP II, a well-tailored program designed to address existing vestiges.

On appeal, the Second Circuit vacated Judge Sand's findings on vestiges. *See, United States v. City of Yonkers*, 181 F.3d 301 (2d Cir. 1999). However, in November 1999, on NAACP's motion for reargument, the Second Circuit remanded the matter to the district court for further fact-finding as to whether vestiges exist and, if so, the appropriate remedy. (1a). Judge Sand has yet to issue any ruling on remand. The Court of Appeals has ordered that jurisdiction be restored to it without a new notice of appeal when any of the parties furnishes it with a copy of the district court's ruling on remand. (32a).

REASONS FOR DENYING CERTIORARI

This Court will only grant a petition for certiorari for compelling reasons, including a conflict with a decision of another circuit or to review an opinion that "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of the Court's supervisory power." Sup.Ct.R. 10.

Petitioners seek review on two issues properly decided by the United States Court of Appeals in 1996. This Court denied certiorari on those very issues in 1997. Since petitioners have identified no intervening authority warranting a contrary result, certiorari should be denied.

Moreover, to the extent it challenges the propriety of EIP II issued by the district court, the petition is premature since there has never been a finding that the school district is unitary and the Court of Appeals has directed the district court to revisit the issue of vestiges.

POINT I

THE SECOND CIRCUIT'S STATE LIABILITY OPINION IS ENTIRELY CONSISTENT WITH SUPREME COURT AUTHORITY

This Court should reject the State of New York's argument that the Second Circuit improperly imposed § 1983 liability against it for failing to remedy *de jure* school segregation of which the State had constructive notice. The State misreads the panel's decision which plainly holds that the State knew about *de jure* segregation in Yonkers. The State also ignores settled Supreme Court authority that § 1983 liability may attach if State decisionmakers ignored constitutional violations that were known or "plainly obvious."

A. *The State's petition is improvident*

The State's petition is untimely on the issue of whether the Second Circuit properly imposed § 1983 liability against the State. The State seeks review of a Second Circuit decision issued on September 23, 1996. (66a). On June 23, 1997, this Court denied the State's certiorari petition which challenged the central tenet of that opinion: the Equal Protection Clause prohibits the State from capitulating to racially-motivated

pressure in declining to correct local school segregation. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

The State now asserts that, in its 1996 opinion, the Second Circuit improperly imposed § 1983 liability on the ground that the State was unaware that school segregation in Yonkers was *de jure*. The State's primary authority for this proposition is *Board of County Commissioners of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997), issued nearly two months before this Court denied certiorari on the Second Circuit's state liability opinion.

The State could have moved for re-hearing on the denial of its Petition when this Court issued *Bryan County*. Sup.Ct.R. 44.2. It did not. Instead, the State chose to wait until the Second Circuit again issued an adverse opinion on unrelated issues over three years later. As the State could have timely preserved its interests in 1997 when this Court last addressed issues surrounding municipal liability under § 1983, certiorari is unwarranted.

B. *The Second Circuit's State liability decision is wholly consistent with settled Supreme Court authority governing municipal liability under § 1983*

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation" of a federally-protected right. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). "In any § 1983 suit, however, the plaintiff must establish the state-of-mind required to prove the underlying violation." *Bryan County*, 520 U.S. at 405.

Although § 1983 does not permit *respondeat superior* liability, municipalities are liable under the Constitution if their "deliberate conduct . . . was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between

the municipal action and the deprivation of federal rights." *Id.* at 404.

Accordingly, as both fault and causation predicate § 1983 liability, *id.* at 405, the question is not (as the State suggests) simply whether the State had "actual knowledge" of constitutional violations. Petition at 18. Rather, liability may attach if the policymaker deliberately disregarded constitutional consequences that were known or "plainly obvious." *Id.* at 411. This test is reflected in the various ways § 1983 plaintiffs may establish municipal liability. *See*, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-91 (1978); *Owen v. Independence*, 445 U.S. 622 (1980); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (§ 1983 authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels"); *City of Canton v. Harris*, 489 U.S. 378 (1989) (municipal liability may attach on an "inadequate training" theory if "the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences").

Notably, in the school segregation context, this Court has held that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. . . . Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'" *Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65 (1979).

The Second Circuit's State liability opinion fell squarely within settled Supreme Court authority and confirmed that

the State both knew about and condoned the segregation and is therefore liable under § 1983.

In holding that the Equal Protection Clause prohibits State officials from capitulating to racially-motivated pressures in failing to eradicate school segregation, the Second Circuit sustained the following factual conclusions reached by the district court:

> [T]hough the district court stated that it did not find that the State officials and UDC themselves performed affirmative acts of intentional discrimination, it found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated. In detail, the district court found, *inter alia*, that
>
> - the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"
>
> - *the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"*
>
> - *the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"*

- the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily[.]"

. . .

Thus, the district court found that the State had exhibited a "determined reluctance to enforce its own desegregation policy in Yonkers"; that the State decided that "it would not force Yonkers to change"; and that determined reluctance was a knowing response to increasing "opposition . . . to racial integration." In sum,

> the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms. (96a-99a) (emphases supplied).

Moreover, State officials took action that helped perpetuate *de jure* segregation. *See*, 77a ("[i]n addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation"); 106a ("[t]he court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated"); 109a (State education officials "were aware that citizen opposition to desegregation in Yonkers was motivated by racial animus. . . . State defendants . . . took actions that encouraged the perpetuation of segregation").

The Second Circuit concluded: "In sum, the record evidence amply supports the district court's finding that the

State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*." (102a).

Accordingly, contrary to the State's petition, the panel imposed § 1983 liability on the ground that the State "knew or should have known" that school segregation in Yonkers was *de jure*. (102a). A plain reading of the panel decision confirms that State officials knew full well that Yonkers' schools were illegally segregated. To the extent the State looked the other way in the face of obvious illegal segregation, settled Supreme Court authority confirms that the Second Circuit properly imposed § 1983 liability against it. Certiorari is unwarranted.

POINT II

THE STATE'S PETITION WITH REGARD TO EIP I FUNDING IS IMPROVIDENT AND PREMATURE

In November 1985, the district court held that the Yonkers Board of Education and the City of Yonkers had engaged in *de jure* segregation in violation of intervenors' constitutional rights. In May 1986, the district court adopted a school desegregation remedy, Education Improvement Plan ("EIP") I, which remains in effect to this date. In 1996, the Court of Appeals held the State defendants responsible for contributing to racial segregation in Yonkers' public schools and the district court ultimately ordered the State to contribute to the annual cost of EIP I.

To this date, the State has never moved in the district court for a declaration that the City of Yonkers School Board has attained unitary status and no evidentiary hearing on this issue has ever been held.

In 1997, the district court determined, for the second time in four years, that the Yonkers school system continued practices which it deemed vestiges of segregation and discrimination. After further remedial proceedings, the district court ordered the State and City defendants to fund EIP II, a well-tailored program designed to address existing vestiges. On appeal, the Court of Appeals for the Second Circuit vacated Judge Sand's findings on vestiges (*see*, 181 F.3d 301 (2d Cir. 1999)) and ultimately — in November 1999 — remanded the matter to the district court for further fact-finding as to whether there are vestiges and, if so, the appropriate remedy. (1a). *See*, 5a ("Now, upon further reflection, we are convinced by Judge Sack's view, expressed in his partial dissent to our initial opinion on this appeal, that it is prudent to ask the district court to make further findings on the present record and in light of this opinion as to whether — or not — there are remaining vestiges of segregation in the Yonkers school system, and if so what they are and what record evidence is relied on for support").

As the issue of vestiges is currently on remand to the district court from the Court of Appeals, there has been no final decision below on whether or not there are continuing educational vestiges of segregation and discrimination and, if there are, how these should be remedied. In the meantime, the State defendants are required to continue to pay their share of the cost of implementing EIP I. Absent a finding of unitary status — and as stated above, no party has made such a motion — the Yonkers Board of Education appropriately has continued to implement that plan. *See*, *Board of Educ. of Oklahoma City Public Schools v. Dowling*, 498 U.S 237, 245 (1991). This Court has long since held that before a defendant school district or State may be absolved from the costs of implementing a desegregation plan, a hearing to establish whether unitary status exists must be held and those opposing such a declaration — typically those who prevailed

in the first instance — must be given a full and fair opportunity to oppose the same. This has never happened here and the State defendants' failure to move below makes immaterial the *dicta* in the recent Court of Appeals decision to the effect that Yonkers has achieved full integration as required by the factors identified in *Green v. County School Board*, 391 U.S. 430 (1968). (15a). In fact, this proposition has never been tested below and there has been no finding that the school district has proceeded in good faith and shall continue to proceed in good faith to implement all the provisions of EIP I.

The State submits to this Court that the relevant current inquiry is whether "a cause of action" against State defendants currently exists. This is fatuous. The inquiry is whether the conditions which the State helped to create are still in need of remedy and, more precisely, whether State or local defendants have carried *their* burden in the district court and established compliance with EIP I and the kind of good faith that would entitle them to relief from that injunction. As no such motion has even been made below, the State has no business seeking this Court's review on this issue.

POINT III

THIS COURT HAS ALREADY DECLINED TO REVIEW THE STATE'S ARGUMENT THAT THE ELEVENTH AMENDMENT PRECLUDES LIABILITY UNDER THE EQUAL EDUCATIONAL OPPORTUNITY ACT AND THE PETITION IS IMPROVIDENT

Like petitioners' § 1983 argument, the certiorari petition is procedurally defective to the extent it seeks review on the issue of whether the Second Circuit properly imposed liability under the EEOA, 20 U.S.C. § 1701 *et seq*. The State seeks review of a Second Circuit decision issued on September 23, 1996. (66a). On June 23, 1997, this Court denied

the State's certiorari petition which expressly asserted that the Eleventh Amendment prohibited the Second Circuit from holding the State liable under the EEOA. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

Relying principally on Supreme Court authority *pre-dating* the last certiorari petition, the State *again* asserts that the Eleventh Amendment precludes the Second Circuit from imposing EEOA liability against the State. The State offers nothing new on this issue other than cite this Court's most recent Eleventh Amendment ruling, *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000). However, the State does not analyze *Kimel* nor suggest that case undercuts the Second Circuit's 1996 State liability decision. *See*, Petition at 25.

On its most recent appeal to the Second Circuit, the State sought to preserve its EEOA arguments by asserting, *inter alia*, that the Eleventh Amendment precludes imposition of EEOA liability against the States. *See*, State Defendants-Appellants' Brief (Second Circuit), Feb. 13, 1998, at 88-89. Resolving this issue, the Second Circuit noted, "[t]he State wishes to preserve its argument that it cannot be held liable as a matter of law for the acts and omissions the district court and this Court have found contributed to segregation in Yonkers, so it raises the argument here again. We reject it for the same reasons we adduced in 1996." *United States v. City of Yonkers*, 181 F.3d at 320 n.4.

As the State offers no basis to revisit an issue that this Court and the Second Circuit have already rejected, certiorari is unwarranted.

CONCLUSION

This Court should deny the petition for certiorari.

Dated: April 13, 2000
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